TAJ MOHAMED A/L K.A.M. MD. ISMAIL & ANOR. (BOTH T/A TAJ MINI MARKET)

v.

KRISHNAN JAGANATHAN

HIGH COURT MALAYA, KUALA LUMPUR
DATO' HJ. ABU MANSOR BIN ALI J.
[CIVIL APPEAL NO. R8-11-30 OF 1990]
14 JANUARY 1993

CONTRACT: Oral agreement - Defendants selling mini market to plaintiff - Plaintiff making payments to defendants' creditors under alleged agreement - Plaintiff claiming refund - Whether any agreement or undertaking to refund - Whether plaintiff entitled to refund.

PRACTICE & PROCEDURE: Appeal against decision of Magistrate allowing plaintiff's claim - Plaintiff making payments to defendants' creditors under alleged agreement - Plaintiff claiming undertaking to refund - Whether agreement or undertaking to refund pleaded - Magistrate holding plaintiff entitled to damages - Whether Magistrate erred.

The case before the Court concerned an appeal against the decision of the learned Magistrate allowing the plaintiff's claim for damages.

The plaintiff's/respondent's claim arose as a result of an oral agreement whereby the defendants/appellants sold their mini market to the plaintiff. The defendants agreed to provide the plaintiff with stock reports, bank statements and statements of accounts to enable the plaintiff to carry on the business but failed to do so. Meanwhile the plaintiff made payments to the defendants' creditors on outstanding bills not disclosed by the defendants before the plaintiff took over. The plaintiff claimed for the refund of the monies. At the trial, the defendants made a submission of no case to answer and the learned Magistrate entered judgment for the plaintiff and awarded damages. The defendants appealed.

The defendants contended that the Magistrate had failed to consider the plaintiff's pleadings as he made an order for the refund of monies paid to the defendants under the oral agreement which could only be done if there was total failure of consideration. Their failure to provide the agreed documents did not prevent the respondents from carrying on with the business. Furthermore there was no agreement between the parties providing for a refund nor was there any evidence of damages as found by the Magistrate. The defendants contended that as the plaintiff had no cause of action there could not be a *prima facie* case and their submission of no case to answer would succeed. The plaintiff contended that it was clear the claim was for breach of contract and if the defendants intended to raise that the respondent had no cause of action they should have applied to strike out the writ. Furthermore, the defendants had only one issue in the memorandum of appeal but at the hearing raised new issues of rescission, refund, total failure of consideration and no cause of action.

Held:

[1] The Court found merit in the defendants' contention that the learned Magistrate failed to consider the plaintiff's pleading. The defendants were exercising their options in making a submission of no case to answer and the mention of the new issues were not issues but had necessarily to be mentioned to augment the defendants' arguments that the plaintiff failed to properly plead the issues before the learned Magistrate.

[2] If the plaintiff said that the breach of contract was based on an agreement, it was incumbent on the plaintiff to clearly plead the agreement. The Court found that what was missing was an agreement by the defendants and neither was there pleaded any undertaking by the defendants to refund any amount paid by the plaintiff to their creditors. Therefore the act of the plaintiff in paying the defendants' creditors was *gratis* and did not spring from any agreement to reimburse.

[3] The loss pleaded in the claim could only be loss if so suffered "as a result of breach" of an undertaking in contract and not damages in tort. The defendants succeeded in their submission that there was an absence of consideration in the pleading and the learned Magistrate should have found that there was no undertaking to refund the amount paid to the defendants' creditors.

[Appeal allowed with costs here and below].

For the appellants/defendants - Joseph Yeo; M/s. Noor, Tung & Kumar
For the respondent/plaintiff - M. Kayveas; M/s. Kayveas & Co.

JUDGMENT

Haji Abu Mansor Bin Ali J:

En. Joseph Yeo appeared for the defendants/ appellants and En. Kayveas appeared for the plaintiff/ respondent in this appeal against the decision of the learned Magistrate dated 3 November 1989 whereby the defendants were ordered to pay plaintiff the sum of RM17,544.29, together with interest at the rate of 8% per annum, from 16 January 1987 to 16 January 1989 and costs in the sum of RM2,207. I allowed the appeal and I set out the grounds for such.

The claim of the plaintiff arose as a result of an alleged oral agreement between plaintiff and defendants dated 8 November 1986 whereby according to the plaintiff, the defendants agreed to sell his Taj Mini Market to the plaintiff for the sum of RM15,000. Pursuant to this alleged agreement the defendants agreed to allow the plaintiff to take over and manage the same.

In para 4 of the statement of claim the plaintiff alleged that the defendants agreed to provide plaintiff with stock report, bank statements and statements of account as at 8 November 1986 to enable the plaintiff to carry on the business.

In para 5 the plaintiff alleged the defendants failed to provide all the items in para 4 of the statement of claim and he alleged he suffered a loss of RM14,839.59 when the plaintiff had to make payments to the several creditors of the defendants in respect of numerous bills left outstanding by the defendants and not disclosed by him before the plaintiff's taking over.

The plaintiff further alleged that the defendants subsequently demanded a further sum of RM16,000 and when the plaintiff failed to pay the said sum to the defendants, the defendants repossessed the said market on 16 January 1987.

In para 8 of the amended statement of claim the plaintiff prayed for the refund from the defendants of RM17,544.29 being the loss and expenses suffered by the plaintiff as a result of the defendants' undertaking given at the time of plaintiff's taking over of the said market.

The plaintiff through his solicitors demanded payment of the said sum of RM17,544.29 but the defendants failed or refused to pay. Hence the plaintiff's claim.

At the trial, the defendants through Counsel at the end of the plaintiff's case elected to make a submission of no case to answer and to stand or fall on his submission. The Magistrate found for the plaintiff as claimed. The learned Magistrate entered judgment for RM17,544.29.

The appellants raised a number of grounds of appeal. In the 1st ground the appellants contended that the learned Magistrate erred in holding at page 46 of the Record of Appeal that the plaintiff was entitled to damages "ganti rugi".

Appellants' Counsel further contended that had the learned Magistrate adhered to the pleadings as amended particularly paragraphs 3, 4, 5, 6, 7, it would be clear that what was claimed by the plaintiff was the refund of the sums he paid to the defendants, totalling RM36,560.41 and the claim from the defendants being RM17,544.29. The appellants' Counsel at the same time, contended that if the plaintiff was claiming for refund as he seems to do, there is no agreement providing for a refund. He added that a refund can only be claimed in the circumstances such as there is a total failure of consideration which was not so here, as the plaintiff was permitted to carry on the business until the repossession by the defendants. What the defendants failed to do was to provide all the stock reports, ledger and list of the things in the mini market but it was clear, so the appellants submitted, such failure did not prevent the plaintiff carrying on with the business.

If the learned Magistrate were to find for the plaintiff in damages, where was the evidence of damages as found by the learned Magistrate? He submitted there is no such evidence of damages. At page 35 of the Record of Appeal, it was put to the plaintiff in cross-examination if he agreed to return the mini market in accordance with D13 to the defendants and the answer was "Ya".

The appellants' Counsel submitted that, in effect, when the learned Magistrate made an order appealed against, he in fact made an order for the refund of the money paid and this can only be done if there is a total failure of consideration. The appellants' Counsel submitted that this was the cause of action espoused by the plaintiff. He submitted that as the plaintiff has no cause of action, there cannot be a *prima facie*

case and his submission of no case to answer would therefore succeed. Appellants' Counsel prayed that the appeal be allowed.

For the plaintiff's Counsel he contended that it is clear from the amended statement of claim that the plaintiff's claim was for breach of contract, such as in para 5 thereof "in breach of the defendants' said promise".

Counsel for the plaintiff further contended he disagreed when the defendants' Counsel said that the learned Magistrate failed to consider the pleadings. He said it was clear from the statement of defence the defendants pleaded in para 4 (page 14 of the Record of Appeal) there was an original agreement. Since the plaintiff was unable to pay the full purchase price and in consideration of the defendants releasing the plaintiff from further liabilities and obligations under the first agreement, the plaintiff by a written agreement dated 1 January 1987 agreed to return the said business to the defendants on terms as stated in paragraph 4(b)(i), (ii) and (iii) of the statement of defence.

Counsel for the defendants says in paragraph 5 of the statement of defence, defendants were to say in evidence that the second agreement was a substitution of the first agreement and the defendants have been discharged from all liability to the plaintiff in respect of the first agreement. The defendants having stated so but he failed to give evidence in defence. In paragraph 6 of that defence the defendants pleaded estoppel.

Counsel for the plaintiff contended that the defendants had only one issue in the memorandum of appeal but then at the bearing raised new issues of rescission, refund, total failure of consideration and no cause of action. He further argued that if the plaintiff wanted to raise that the plaintiff had no cause of action, he should have brought a summons to strike off the writ.

On the first issue that the learned Magistrate, failed to consider the respondent's pleading, I find there is merit in that appellants' contention. The appellants are exercising their own options, in making a submission of no case to answer, and the mention of rescission, refund, total failure of consideration and no cause of action are not issues but, I find they had necessarily to be mentioned to highlight the state of the plaintiff's pleadings to augment the defendants' argument that the plaintiff failed to properly plead the issues before the learned Magistrate.

What the appellants' Counsel said was, if the plaintiff said that the breach of contract was based on an agreement, it is incumbent on the plaintiff to clearly pleaded the agreement. In this case I pose the question was there an agreement that the plaintiff was to pay the claims of the creditors amounting to RM17,544.29 left by the defendants? In the absence of any clear agreement what the plaintiff alleges in paragraph 8 of the statement of claim was "the defendants refussed and/or neglected to refund to the plaintiff the sum of RM17,544.29 being the loss and expenses suffered by the plaintiff as a result of the breach of the defendants' undertaking given to the plaintiff at the time of the plaintiff's take-over of the said market". That alleged undertaking was mentioned in paragraph 4 of the statement of claim and it was "the defendant shall undertake to **furnish** the plaintiff with stock report, bank statement and statement of account as at 8 November 1986 ... to enable the plaintiff to carry on the business ...". Then in paragraph 5 thereof the plaintiff states in breach of the defendants' promise to furnish reports etc., the plaintiff suffered loss and expenses in the sum of RM17,544.29 being payments made by the plaintiff to the several creditiors of the defendants. I find what is missing completely, is an agreement by the defendants and neither was there pleaded any undertaking or promise by the defendants that they would refund any amount paid or to be paid by the plaintiff to their creditors.

Where was the agreement here? It is missing and I can only say that the act of the plaintiff in paying the defendants' creditors was *gratis*, and did not spring from any agreement to reimburse.

It is common issue between the parties that the loss pleaded in paragraphs 5, 8 and 9 of the claim can only be loss if so suffered "as a result of breach" of an undertaking in contract - and not damages in tort.

I find that appellants succeed in their submission that there was absence of consideration in the pleading and the learned Magistrate should have found that there was **no undertaking** to refund the amount paid by the plaintiff in

settlement of the defendants' creditors. With due respect to the learned Mgistrate, when she awarded "ganti rugi" in her judgment, I am afraid she got herself a bit confused as to the nature of the claim, that any award she was to give must be based on a breach of agreement, if any, and that was what she had to consider here in this case.

I confirm that as at page 35 of the Appeal Record there is an admission by the plaintiff that his debt to the defendants is greater than his claim. I find merit in the submission of Mr. Kayveas for the defendants that if the appellants had wanted to bring that as an issue it should have been made the subject of a counterclaim.

I find the first ground of appeal is the only substantial issue raised by the appellants and since my decision is that it had merit, I therefore allow this appeal with costs here and also, since my decision is not to give an order for a retrial as I hold that would be undue hardship on the defendants, I also hereby give cost to the defendants in the Court below.

TAN KIM SENG

v.

TAN KIM SAN

HIGH COURT MALAYA, KUALA LUMPUR
DATO' HAJI ABDUL MALEK BIN HAJI AHMAD J.
[ORIGINATING SUMMONS NO. D5- 24-65-94]
8 JULY 1994

PRACTICE & PROCEDURE: Application by respondent to set aside injunction order granted ex parte to restrain respondent from voting at EGM - Applicant's affidavit in reply served a day before hearing contrary to O. 32 r. 13(2) RHC - Whether affidavit should be disregarded - Contention that injunction did not affect outcome of voting - Whether respondent entitled to vote - Whether injunction ought to have been granted - Whether damages should be awarded - Dispute on question of trust - Originating summons filed by applicant - Whether writ more appropriate.

COMPANY LAW: Respondent holding voting rights of shares on trust - EGM to be held - Respondent not in favour of resolution to be voted on - Applicant obtaining injunction to restrain respondent from voting at meeting - Whether injunction prohibited by O. 29 r. (2C) RHC.

INJUNCTION: Injunction granted able to be set aside "by further order" - Whether injunction perpetual or interlocutory - Consideration of O. 29 r. (2B) RHC.

This was an application by the respondent to set aside an order of injunction obtained by the applicant on 26 March 1994 to restrain the respondent from exercising his voting rights attached to shares in Tan Cheong Leong & Sons Realty Sdn. Bhd. (the company), which the respondent held in trust for Tan Kim Kow, as the applicant was not in favour of a resolution to be passed at a scheduled extraordinary general meeting (EGM). The respondent also prayed for damages sustained by him as a result of that order.

The learned Counsel for the respondent objected to the applicant's affidavit in reply which was served on him a day before the date of the hearing contending that the affidavit should be disregarded. In his affidavit the applicant had stated that the Court order did not actually affect the outcome of the voting at the EGM because the resolution was voted down by a majority and as the shares held in trust only